The Eighth Circuit Considers Implied Consent, but I Still Haven't Found What I'm Looking For

Author : Shea Denning

Categories : Evidence, Motor Vehicles, Search and Seizure

Tagged as : blood test, breath test, fifth amendment, implied consent, Missouri v. McNeely, refusal, South Dakota v. Neville, Wall v. Stanek

Date : September 17, 2015

I admit that I may have a problem. I am dedicated to (perhaps obsessed with) the pursuit of a legal theory that satisfactorily squares the doctrine of implied consent with the Fourth Amendment. A thousand Westlaw searches later, I have yet to find analysis such an analysis by a court. So I was a little surprised when the United States Court of Appeals for the Eighth Circuit explained earlier this summer that the Supreme Court determined more than thirty years ago in *South Dakota v. Neville*, 459 U.S. 553 (1983), that implied consent testing carried out under threat of license revocation comported with the Fourth Amendment. Did I miss something?

I don't think so, but you can judge for yourself.

The facts of *Wall v. Stanek*, 794 F.3d 890 (8th Cir. 2015). Rebecca Wall was pulled over by a sheriff's deputy for a traffic violation in the early morning hours of June 20, 2011. The deputy who stopped Wall noticed that she smelled of alcohol and had poor balance. Wall failed multiple field sobriety tests and registered an alcohol concentration of .10 on a portable breath test. She was arrested for impaired driving and taken to patrol headquarters. The arresting officer asked Wall to consent to a urine or blood test to determine her alcohol concentration. The deputy informed Wall that Minnesota law required her to take such a test, that refusal to take a test was a crime, and that she had the right to consult with an attorney before taking the test. After being so advised, Wall agreed to submit to a urinalysis. Wall failed to produce a urine sample, however, and was taken forty-five minutes later to a hospital, where she agreed to have her blood drawn for analysis. The blood was withdrawn about two hours after Wall was stopped. The resulting alcohol concentration was a .06. The DWI charges against Wall were subsequently dismissed.

The lawsuit. Rebecca Wall sued the county in federal district court, alleging that it had a policy of conducting warrantless, nonconsensual blood-alcohol tests in violation of the Fourth Amendment. The county moved for summary judgment, arguing that Wall had voluntarily consented to the blood draw. The district court agreed and granted summary judgment for the county. Wall appealed.

The Eighth Circuit's analysis. The Circuit Court began by recognizing that Wall had a legitimate expectation of privacy, protected by the Fourth Amendment, in her own blood and the physiological data it contained. Thus, the withdrawal and analysis of Wall's blood had to satisfy the Fourth Amendment's reasonableness requirement. The court characterized the county's evidence that Wall consented to the blood draw after she was unable to produce a urine sample as undisputed, and noted that consent searches had been deemed reasonable under the Fourth Amendment. The court rejected Wall's argument that the choice she was provided between consent and punishable refusal negated the validity of her consent by placing her in an unconstitutional dilemma.

The Eighth Circuit turned for guidance to *South Dakota v. Neville*, 459 U.S. 553 (1983), a case in which it said "[t]he United States Supreme Court has previously examined the dilemma created by similar implied consent laws." 794 F.3d at 894. The implied consent statute at issue in *Neville* penalized a blood-alcohol test refusal with a one-year license revocation and with use of the refusal against the defendant at trial rather than with the criminal sanctions imposed

under Minnesota law. The *Wall* court interpreted *Neville* as deciding that since blood testing can be compelled, "'the offer of taking a blood-alcohol test is clearly legitimate'" and "'becomes no less legitimate when accompanied by the option of refusing with attendant penalties.'" 794 F.3d at 894 (quoting *South Dakota v. Neville*, 459 U.S. 553, 563 (1983)). *Wall* said Minnesota's imposition of direct criminal consequences did not alter the analysis as *Neville* "gave no apparent regard to the harshness of [the penalty]." *Id*.

Wall concluded that *Neville*, combined with dicta from the plurality opinion in Missouri v. McNeely, 569 U.S. ___, 133 S.Ct. 1552 (2013), describing implied consent laws as a legal tool that does not require warrantless nonconsensual blood draws, undermined "Wall's straightforward coercion argument." 794 F.3d at 894. The court held that "Wall's dilemma, alone, does not satisfy her burden of nullifying her otherwise uninhibited consent." *Id.* at 896.

What *Neville* really held. The United States Supreme court in *South Dakota v. Neville*, 459 U.S. 553 (1983), held that the admission into evidence of a defendant's refusal to submit to a blood-alcohol test did not offend the Fifth Amendment right against self-incrimination. *Neville* followed the Supreme Court's determination in *Schmerber v. California*, 384 U.S. 757 (1966), that a state could force a defendant to submit to a blood-alcohol test without violating the defendant's Fifth Amendment right against self-incrimination, and it answered a question explicitly left open in *Schmerber*.

The *Neville* court accepted the premise, as established by *Schmerber*, that the State could force a person suspected of impaired driving to submit to a blood-alcohol test, and it evaluated the defendant's refusal to submit to testing under South Dakota's implied consent laws against that back-drop. The *Neville* court concluded that "no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal." *Id*. at 562. In reaching this conclusion, the Court considered the legitimacy of the choice being offered to the defendant, citing *Schmerber* for the proposition that "[t]he simple blood-alcohol test is so safe, painless, and commonplace . . . that the state could legitimately compel the suspect . . . to accede to the test." *Id*. at 563. The Court reasoned that providing the option of refusing to be tested and attendant penalties did not make the blood-alcohol test request less legitimate. The court noted that the State did not "subtly coerce[]" the defendant into choosing the option it had no right to compel; to the contrary, the State's goal was to have the suspect ***choose*** to take the test rather than to refuse. *Id.* at 563-64.

Followers of my implied consent quest (are there any?) know that the Supreme Court in *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552 (2013), clarified that *Schmerber* did not establish a per se exception to the warrant requirement in impaired driving cases. Instead, one must consider the totality of the circumstances in a given case to determine whether a nonconsensual warrantless blood test of a drunk-driving suspect is reasonable under the Fourth Amendment.

In light of *McNeely*, *Neville* (which presupposed that all testing of impaired driving suspects could be compelled under *Schmerber*) cannot be read to resolve the issue of whether implied consent testing is reasonable under the Fourth Amendment. *Neville* addressed the Fifth Amendment, and it did so in the context of deciding whether the result that the State *did not want*—refusal—was coerced. *Neville* did not address whether a suspect's *submission* to such testing under threat of penalty was voluntary.

It may well be that implied consent testing can be reconciled with traditional Fourth Amendment analysis. Perhaps implied consent searches are a new kind of special needs searches. Perhaps breath tests may be justified under a per se exigency exception even if blood tests are not. Whatever the ultimate explanation, the Eighth Circuit's reasoning does not end my quest.